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In The

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551, 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT BRIEF FOR THE PETITIONERS

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In The

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OCTOBER TERM, 1977

Nos. 77-452, 77-457, 77-551 and 77-602

MOBIL ALASKA PIPELINE COMPANY, EXXON PIPELINE COMPANY, BP PIPELINES INC. and ARCO PIPE LINE COMPANY,

Petitioners,

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UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit (746a) is reported at 557 F.2d 775.

Jurisdiction

The judgment of the Court of Appeals was originally entered July 29, 1977. 772a. The petition of BP Pipelines Inc. for rehearing was denied on September 8, 1977. 774a. Petitions for writs of certiorari were filed Sep-

tember 22, 1977 (Nos. 77-452 and 77-457), October 12, 1977 (No. 77-551) and October 25, 1977 (No. 77-602). The petitions were granted November 28, 1977, and the cases consolidated for argument. 789a. The jurisdiction of the Court is based on 28 U.S.C. §§ 1254(1) and 2350(a).

Questions Presented

1. Does section 15(7) of the Interstate Commerce Act authorize the Commission which administers that act to suspend the original tariff schedules of an interstate oil pipeline, whose operation has been duly authorized by Congress, where the effect of such suspension is to leave the pipeline without any schedules and to forbid it to operate while the suspension continues?

2. If the Commission does possess the power to suspend such original schedules, may it exercise such power, not to preserve the status quo of transportation but in order to compel the carrier to provide service during the suspension period at lesser rates summarily fixed by the Commission?

3. If the Commission may suspend such original schedules and if it may do so in order to compel adoption of interim rates fixed by itself, may it fix such interim rates without full hearing and without creation of a record which would permit judicial review of the adequacy of such rates under the standards of the Interstate Commerce Act and the Constitution?

4. May the Commission require, as a "valid corollary" of its suspension power, that a carrier waive its right to have the amount of any reparations it may owe determined in accordance with the procedures established by law?

Statutory and Constitutional Provisions Involved

These cases concern Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976), as amended, notably by the

Hepburn Act of 1906, ch. 3591, 34 Stat. 584, and by the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539. Also involved are sections 2 and 3 of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651, 1652 (Act of Nov. 16, 1973, Pub. L. No. 93-153, Tit. II, §§ 202, 203, 87 Stat. 584). The relevant provisions of these statutes are set forth in the Statutory Appendix to this Brief. The cases also present issues arising under the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

These cases raise the question whether section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) (1976), confers upon the agency which administers that act arbitrary, unreviewable power either to forbid the transport of oil over a newly constructed oil pipeline for a seven month suspension period or to dictate the rates, terms and conditions upon which such a pipeline shall be operated during such period.[1] The question arises with respect to the Trans Alaska Pipeline System ("TAPS"), an 800-mile crude oil pipeline whose construction was specially authorized by act of Congress. 43 U.S.C. §§ 1651, 1652(a). Petitioners are

1. Until October 1, 1977, the Interstate Commerce Commission was charged with authority to administer all provisions of the Interstate Commerce Act. On that date, however, pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (August 4, 1977) (to be codified in 42 U.S.C. §§ 7101-7352), and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), regulatory responsibility for establishment of rates and valuation of oil pipelines was transferred to the Federal Energy Regulatory Commission (FERC).

four of the eight owners of TAPS. Three of the other owners have intervened in these cases.[2]

Background Facts

Following discovery of large reserves of crude oil on Alaska's North Slope in 1968, plans were announced to build a pipeline to transport crude oil from Prudhoe Bay on the Alaskan North Slope across arctic wilderness to the ice free port of Valdez on the Gulf of Alaska. Construction of the pipeline, scheduled to begin in 1970, was delayed until 1974 by litigation over environmental issues.[3]

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2. The eight carriers who share TAPS ownership are:

Sohio Pipe Line Co.	(Intervenor)	33.34%
ARCO Pipe Line Co.	(Petitioner)	21.00
Exxon Pipeline Co.	(Petitioner)	20.00
BP Pipelines Inc.	(Petitioner)	15.84
Mobil Alaska Pipeline Co.	(Petitioner)	5.00
Phillips Alaska Pipeline Corp.	(Nonparty)	1.66
Union Alaska Pipeline Co.	(Intervenor)	1.66
Amerada Hess Pipeline Corp.	(Intervenor)	1.50
		100.00%

The TAPS owner which is not a party here, Phillips Alaska Pipeline Corp., filed its tariff later than the other carriers, and the Commission suspended that tariff several weeks after the suspensions here at issue. Phillips Alaska has challenged the ICC's action in the Court of Appeals for the District of Columbia Circuit and that court has granted it the same interim relief which this Court has granted the other parties, deferring decision on the merits pending the decision of this Court. *Phillips Alaska Pipeline Corp.* v. *ICC,* No. 77-1741 (D.C. Cir., filed August 17, 1977).

3. *See, e.g., Wilderness Society* v. *Morton,* 479 F.2d 842 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973); 748a, n.2. On the way to Valdez, TAPS crosses some of the most rugged terrain in North America, some 800 rivers and streams, flood plains, and high mountain passes. 189a-204a. The impact of TAPS on this wilderness environment caused concern to TAPS owners as well as to others. Unusual engineering problems resulted from the presence of permafrost, a permanently frozen subsurface layer covered in many places by a seasonal freeze-thaw layer with surface vegetation called tundra. The

Congress ended the delay caused by these disputes when it enacted the Trans-Alaska Pipeline Authorization Act on November 16, 1973, declaring that "[t]he earliest possible construction of a trans-Alaska oil pipeline . . . will best serve the national interest," and that "[t]he early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources." 43 U.S.C. § 1651 (1976).[4] TAPS construction was completed in June 1977 at a total cost of more than $9 billion.[5]

Under the form of ownership which the TAPS owners have adopted, each holds an undivided interest in the system as its separate property. Each has the right and obligation to utilize its share of TAPS capacity as an independent common carrier, to transport crude oil for any shipper without discrimination at a fair and reasonable cost consistent with its statutory right to a fair return on investment. 49 U.S.C. §§ 1(5), 15a (1976). As a result of this form of ownership, the TAPS carriers in fact constitute eight separate competing pipelines. Six of the TAPS carriers are directly affiliated with companies engaged in production of Alaskan North Slope oil, but owners of two of the carriers, BP Pipelines Inc. and Union Alaska Pipe-

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heat caused by pipeline construction and by the transport of hot crude oil through the pipeline created risks both to this ecologically fragile environment and to the stability of the pipeline, requiring development of innovative design techniques. Frequent seismic activity further complicated the goals of environmentally safe construction and operation.

4. Pub. L. No. 93-153, § 202, Tit. II, 87 Stat. 584.

5. In the Commission order at issue herein, total cost was estimated at appoximately $9.2 billion. *See* estimates at 640a. The most current cost estimates, submitted by the TAPS owners to the FERC on November 30, 1977, indicate a total construction cost of $9.084 billion, including approximately $1.275 billion in interest costs incurred during construction and capitalized.

line Co., own none of the oil now in production. Other carriers own a larger percentage of pipeline capacity than their affiliates' share of North Slope oil. Such carriers cannot rely on their affiliates to supply sufficient oil for shipment at full capacity, but must compete for shipments from North Slope producers who own no interest in TAPS or whose production exceeds their affiliates' share of pipeline capacity. A table showing the comparative interests in the pipeline and in current oil production is set out in the footnote below.[6]

As TAPS construction neared completion, each carrier independently calculated and adopted a schedule of rates for interstate shipment. Pursuant to the regulation which requires that original pipeline tariffs be filed with the Interstate Commerce Commission ("Commission" or "ICC") on not less than ten days' notice (49 C.F.R. § 1300.57(e) (1976)), seven TAPS owners filed tariffs between May 30 and June 10, 1977.

6. Comparative Table:

	Net Interest in Oil Rim Participating Area of the Prudhoe Bay Unit	TAPS Interest of Subsidiary
Standard Oil Co. (Ohio)	46.511	33.34
Atlantic Richfield Co.	17.740	21.00
Exxon Corporation	17.740	20.00
State of Alaska	12.500	—
Mobil Oil Corp.	1.832	5.00
Phillips Petroleum Corp.	1.789	1.66
Amerada Hess Corp.	.471	1.50
British Petroleum Co. Ltd.	—	15.84
Union Oil Co. of California	—	1.66
[Ten Other Producers]	1.417	—
	100.000%	100.00%

This table shows only the interests of producers in the reservoir of oil which is currently in production. The producing interests in reserves which may be found or tapped in the future cannot be predicted at this time. (Figures are taken from verified statement of R. Gary, Morgan Stanley & Co., Nov. 30, 1977, submitted in FERC OR78-1, *Trans Alaska Pipeline System,* which has been lodged with the Clerk.)

Proceedings Before the Commission

On June 13, 1977, the Commission issued a notice of a special suspension proceeding, pursuant to 49 U.S.C. § 15(7), to consider suspension of the seven TAPS tariffs then on file. 2a.[7] The notice provided that, contrary to the usual rule in suspension cases (*see* 49 C.F.R. § 1100.200), this proceeding was to bypass the Commission's staff suspension board and its appellate division of three Commissioners and would instead be presented directly to the full Commission. 2a.

Four parties — the State of Alaska, the Arctic Slope Regional Corporation ("ASRC"), the Antitrust Division of the Department of Justice, and the ICC's Bureau of Investigations and Enforcement (the "Bureau") — filed protests challenging the TAPS tariff rates as too high. Each protestant urged that the Commission suspend the original tariffs and prescribe lower "interim" tariff rates at which the pipeline should be operated during the suspension period. Alaska and ASRC, now respondents before this Court, asserted their financial interests in minimizing the TAPS tariff rates as grounds for intervention.[8] The

7. At the Commission's request, carriers whose tariffs bore effective dates prior to June 30 filed amendments so that no tariff would be effective before June 30. Suspension of a tariff is effective only if ordered prior to the tariff's effective date. 49 U.S.C. § 15(7).

8. When Alaska sold the Arctic Slope oil leases in 1969 for a record $900 million, it retained a royalty right to 12½% of the oil produced, payable in kind or in cash, based on the value of the oil at the wellhead. Wellhead value is found by taking the sales price of the oil as delivered at refineries in the lower 48 states and subtracting certain processing charges and all transportation charges back to the North Slope. Accordingly, wellhead value goes up as the pipeline tariff goes down. In addition to its 12.5% royalty, Alaska imposes a severance tax averaging 11.5% of the wellhead value of all oil produced except its own. Thus, with respect to both its royalty and tax interests, Alaska has a stake in securing a low pipeline transportation charge in order to maximize wellhead value.

Department of Justice asserted an antitrust theory, contending that higher rates would discourage independent oil companies from developing North Slope leases in competition with the carriers' affiliates, while lower rates would make such competition more advantageous for the independents. Consumer interests did not protest the tariffs, as the price of Alaskan crude oil delivered at the refinery is not affected by the cost of pipeline transport.[9] TAPS owners maintained that their original tariffs were reasonable as filed, and that suspension of those tariffs and prescription of interim rates was not authorized by the Interstate Commerce Act.[10]

A hearing, for purposes of oral argument only, was held before the Commission on June 27, 1977. The Commission, in accordance with its rule in suspension cases, took no evidence.[11] The Bureau asserted that, if the Commission suspended the original tariffs and decreed a maximum interim rate, then the carriers would be obligated to file an interim tariff at that rate and to furnish transportation to the public or face prosecution for failure to perform the duties of a common carrier. App. (Vol. III) Ex. 1,

ASRC is one of 12 corporations established to conduct native Alaskan business for profit by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627. *See* 749a, n. 7. ASRC released its claims of aboriginal title to the oil fields in exchange for a statutory right to a 2% royalty, which is taken out of Alaska's royalty, but subject to a ceiling of $500 million. 43 U.S.C. § 1608 (1976). Thus, although ASRC is expected to receive the full cash amount in any case, it will receive it at a faster rate if TAPS rates are minimized.

9. The Economic Regulatory Administration of the Department of Energy imposes a maximum price on Alaskan crude as delivered at refineries in the lower 48 states, 10 C.F.R. § 212.74, *see* 42 Fed. Reg. 41565 (August 17, 1977), and in practice the oil sells slightly below the maximum, at a price fixed by supply and demand in close and direct relation to the price of imported crude which, in turn, is fixed by the OPEC nations.

10. Most of the protests and replies thereto have been reprinted in Volume I of the Appendix.

11. *See* 49 C.F.R. §§ 1100.19, 1100.200 (1976).

145-47. The Antitrust Division warned that any collective failure by the carriers to file tariffs at interim rates dictated by the Commission would prompt the Division to consider action under the Sherman Act. App. (Vol. III) Ex. 1, 119-21.

On the following day, June 28, 1977, the Commission entered an order in which it: (1) suspended seven TAPS rate tariffs for the maximum seven-month period specified in 49 U.S.C. § 15(7)[12]; (2) instituted a formal adjudicatory investigation into the lawfulness of the suspended rates pursuant to 49 U.S.C. §15(1); (3) fixed maximum interim rates to be effective during the suspension period, and authorized the TAPS owners to refile, on one day's notice, tariffs at those rates; and (4) conditioned the effectiveness of both the original tariffs and the prescribed "interim" tariffs on the carriers' undertaking to make refunds to shippers in the event that the Commission ultimately determined that the interim rates or original rates were unlawfully high. 636a-39a. A comparison of the carriers' original rates and the different interim rates which the Commission fixed for each carrier is set forth below.

	Original Rates	"Interim" Rates	Reduction	% of Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59	24.7%
ARCO Pipe Line Co.	6.04	4.91	1.13	18.7%
BP Pipelines Inc.	6.35	4.68	1.67	26.3%
Exxon Pipeline Co.	6.27	5.10	1.17	18.7%
Mobil Alaska Pipeline Co.	6.31	4.84	1.47	23.3%
Phillips Alaska Pipeline Corp.	6.22	4.87	1.35	21.7%
Sohio Pipe Line Co.	6.16	4.70	1.46	23.7%
Union Alaska Pipeline Co. ..	6.09	4.89	1.20	19.7%

The Commission's order recognized that the carriers' original tariffs would be effective upon the expiration of the suspension period, January 29, 1978, if the investigation had not been completed before that date. 628a.

12. The tariff of Phillips Alaska Pipeline Corp., the eighth owner, was filed June 20, 1977 and suspended July 19, 1977.

The Commission noted that if it allowed the carriers' original rates to go into effect and later adjudged them excessive, the carriers would be required to make reparations to shippers to the extent of any excess previously collected. 627a, 629a.[13] And the Commission acknowledged that, under the statutory scheme, the carriers themselves "may have no means of obtaining restitution" if the Commission should ultimately determine that the interim rates were fixed at improperly low levels. 629a. Nonetheless, the Commission concluded that suspension was justified on the grounds that protestants had made "a showing of probable unlawfulness." 627a. The Commission did not find, however, that preservation of the status quo was preferable to commencement of operations at the carriers' original rates. It held, instead, that suspension "without allowing interim rates" would be "contrary to the interests of all concerned" because it would block the commencement of operation by the pipeline. 629a.

In its calculation of interim rates, the Commission relied "for the most part" on a "staff estimate" of the value of each carrier's interest in the pipeline, apparently derived from cost data which had been supplied informally by the carriers. *See* 630a, 640a-43a. Using an assumed throughput of 1.2 million barrels per day, the Commission fixed each carrier's tariff according to a formula set forth in the order.[14] Without stating reasons or considering the evi-

13. Under 49 U.S.C. § 8, carriers are liable for reparations equal to the "full amount of damages" caused by previous exaction of an excessive rate, together with interest. *Louisville & Nashville R.R.* v. *Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925). A court may also award reasonable attorney's fees in connection with such reparations. *ICC* v. *Atlantic Coast Line Ry.*, 383 U.S. 576 (1966).

14. The carriers had provided data informally, as well as in reply to the protests, demonstrating that maximum throughput during the first seven months of operation could attain little more than one million barrels per day. 580a, 583a-86a. Subsequent experience has

dence as to the financial risks of the project that might have been offered at an evidentiary hearing, the Commission concluded that its interim rates would provide a return sufficient to attract capital under the standard of *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). 634a. While the carriers contended that the relevant return should be calculated as a net percentage of valuation, after payment of interest costs, the Commission used as the relevant figure a gross percentage and did not permit the carriers to deduct their interest costs as a cost of doing business.[15]

On September 27, 1977, three days before the ICC was divested of pipeline jurisdiction by transfer of such authority to the Federal Energy Regulatory Commission, the ICC denied the carriers' petitions for reconsideration of the order fixing the interim rates. In denying the petitions, however, the Commission acknowledged that it had calculated the interim tariffs using higher throughput figures than it had anticipated would actually be possible during the pipeline's startup period, but stated that "we did not consider it suitable to use the throughput level of a short initial period, such as the suspension period," as a basis for calculating the interim rate for such a period. 777a. Three commissioners dissented, recommending that the interim tariffs be increased by 42 cents per barrel. 781a.

shown that the throughput was substantially less than even the carriers anticipated during the period, in part because of damage caused by an explosion and fire at TAPS Pump Station No. 8 on July 8, 1977. This accident reduced the pipeline's projected throughput for the suspension period to only 730,000 barrels. Repairs to the pump station are expected to be complete by March of 1978. *See* Prepared Direct Testimony of Gordon Hutchinson, Nov. 30, 1977, at pp. 15, 27 (FERC No. OR78-1, *Trans Alaska Pipeline System*). A copy of this testimony has been lodged with the Clerk of the Court. *See also* N.Y. Times, July 11, 1977, at 40, col. 1; *id.*, July 13, 1977, § IV, at 16, col. 5.

15. The Commission stated no reason for making the calculation in this manner and the carriers contend that it deviated without explanation from prior practice. 625a. *See, e.g.*, 425a-32a. *See Atchison, T. & S.F. Ry.* v. *Wichita Bd. of Trade*, 412 U.S. 800 (1973); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

Proceedings Before the Court of Appeals

Pursuant to 28 U.S.C. §§ 2321(a) and 2342(5), petitioners separately invoked the jurisdiction of the United States Court of Appeals for the Fifth Circuit to review and reverse the suspension order.[16] Petitioners sought preliminary injunctive relief, pursuant to 28 U.S.C. § 2342(5), asserting that, if they were compelled to commence operations at the lesser rates fixed by the Commission, they would incur irreparable loss; that, if it were ultimately determined that the Commission's interim rates were fixed at improperly low levels, there would be no way to recover the balance of the fair charge for transportation from shippers who had used the pipeline in the meantime; and that the interim rates were in fact so low as to force pipeline operation at a net loss (650a-52a, 619a-21a), though not so great a loss as the carriers would have incurred if the pipeline stood idle for seven months. Petitioners also pointed out that, unless the court granted injunctive relief permitting collections to be made under the carriers' original tariffs, the amounts at issue would be dissipated day by day during the suspension period, depriving the court of power to effect a remedy. The United States, through attorneys for the Antitrust Division who had previously appeared before the ICC, moved to dismiss on the ground that the June 28 order was an exercise of the Commission's discretionary power and, therefore, not subject to judicial review. 726a.

Following oral argument on the motions for preliminary injunctive relief and on motion to dismiss, a divided panel of the Court of Appeals dismissed the consolidated cases on July 29, 1977. Declaring that the reference in 49 U.S.C. § 15(7) to "any schedule stating a new . . . rate" had no "plain meaning," the majority concluded that the Commission was empowered to suspend an original tariff, and that

16. Venue was properly fixed in the Fifth Circuit because the principal place of business of Mobil Alaska Pipeline Company, the first carrier to file a petition, is in Dallas, Texas. 28 U.S.C. § 2343.

such a decision was not reviewable under the statute. 754a-57a. The majority appeared to agree that the Commission had no power to fix interim rates. It held, however, that the Commission had not in fact done so, but had merely "partially waive[d]" its discretionary power to suspend, giving the carrier a choice of operating on the Commission's terms or not at all. 757a-58a. *See* 49 U.S.C. § 6(7). Acknowledging that Constitutional standards might require that, in some cases, a court should review the action of the Commission in fixing a maximum interim rate, the majority stated that a record which would permit such review was lacking in the present case. 761a. The majority acknowledged that TAPS losses would be "irretrievable" and that the carriers estimated those losses at some $340 million. 754a.[17]

In dissent, Circuit Judge Roney argued that in fixing a maximum interim rate the Commission had exceeded its power to suspend a tariff. He was prepared to assume, without deciding, that the Commission could suspend a pipeline carrier's original tariff, but would have held such suspension reviewable where the absence of pre-existing rates left the carrier without any tariff. 763a. In his view, if the Commission did seek to fix interim rates, it was required to do so in accordance with procedural standards and upon a hearing record which afforded a basis for judicial review. 764a-65a. He also concluded that "the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital," and that it was "arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor." 771a.

17. In view of the reduction in pipeline capacity which resulted from the July 8 explosion at a TAPS pumping station, it is now clear that great loss would have been incurred even if the carriers had been allowed to commence operations at their original rates. *See* note 14, *supra*.

The Court of Appeals rendered its decision at about the same time that the first shipment of oil reached Valdez. Thereafter, in order to limit their losses and permit the transport of North Slope Oil to the lower 48 states, the carriers filed tariffs at the interim rates set forth in the Commission's June 28 order.[18]

Petitioners operated at those rates, incurring irreparable loss day by day, until October 20, 1977, when this Court granted the applications for injunctive relief made in Nos. 77-452, 77-457 and 77-551, permitting collection to commence at the rates provided in the carriers' original tariffs, subject to the requirement that the carriers account for and refund "any portion of the amounts collected under such rates by virtue of the stay which it is ultimately determined that they were not lawfully entitled to collect." 784a. The order was superseded by an order issued November 14, 1977 which contained similar provisions, and which was made applicable to all seven of the carriers involved in these cases. 785a.

SUMMARY OF ARGUMENT

The Commission's order, as affirmed by the Court of Appeals, has circumvented the regulatory plan established by Congress in the Interstate Commerce Act. Under that act, an interstate oil pipeline may unilaterally establish and put into effect its original rates. The Commission is empowered (1) to investigate the rates set by the carrier, to determine whether they are just and reasonable; (2) to prescribe rates for the future, if, after full hearing, those set by the carrier are found to be excessive; and (3) to order reparations to any person who proves injury resulting from the unlawful rates. In the instant cases, the Commission exceeded its authority in each of these respects. Its order would frustrate the Congressional plan and has already imposed severe and irrecoverable losses upon the carriers in a manner not intended by Congress. The absence of both statutory and evidentiary support for the Commission's order requires that the Court of Appeals' decision be reversed and the Commission's order set aside.

The Court of Appeals' decision was premised on three erroneous assumptions: first, that the Commission has the power to suspend an original, as opposed to a changed, rate; second, that the Commission's suspension power is absolute and arbitrary; and third, that the Commission may "waive" part of that supposedly absolute power by prescribing rates which it deems acceptable, without following the ratemaking procedure required by statute.

The Commission and the Court of Appeals committed fundamental error in concluding that the Commission may suspend a carrier's original rate. The language, history and purpose of the suspension provision, 49 U.S.C. § 15(7), demonstrate that the Act was intended to strike a delicate balance between assurance of service to the public at lawful rates and the protection of private property rights. A review of the background of the Mann-Elkins Act of 1910,[19] in which the suspension power was introduced, shows that the purpose of the enactment was to vest in the Commission authority to investigate changes in rates before they took effect, and to preserve the status quo of transportation for a limited period pending the investigation. Congress regarded suspension as fair to the carriers and consistent with requirements of due process because carriers were to continue operations during the suspension period at rates which the carriers themselves had previously fixed. There is no suggestion in the legislative history that Congress

18. Petition for rehearing by BP Pipelines Inc. was denied on September 8, 1977 (774a.), as were motions by Exxon Pipeline Co. for stay of the mandate and stay of the ICC order pending petition for review on writ of certiorari. 773a. On that same date the Court of Appeals for the Fifth Circuit also denied a petition for review by Union Alaska Pipeline Company, an intervenor here.

19. Section 12, ch. 309, 36 Stat. 539, 551.

intended that this power should be used to block service on a new line by suspending an original rate, thereby leaving the carrier without any lawful rates for its railroad or pipeline.

Nor may the suspension power, or the threat of its exercise, be employed as a "short cut" to the prescription of rates. This Court has held that the power to fix rates is "of supreme delicacy and importance," and may "not . . . be presumed from any doubtful and uncertain language," *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway,* 167 U.S. 479, 505-06 (1897). Indeed, it was in response to that pronouncement that Congress granted the Commission authority to set rates in the Hepburn Act of 1906. But Congress provided that the Commission might set rates only after "full hearing," so as to facilitate judicial review of the Commission's decision. 49 U.S.C. § 15(1). Thus, Congress established a regulatory plan in which carriers are allowed to operate either at rates initiated by themselves, or at rates prescribed by the Commission in accordance with due process of law, upon a record which allows judicial review. The action by the Commission in these cases disregarded these plain statutory dictates, resulting in the prescription of rates without any evidentiary basis and in a manner which would preclude judicial review. Attempts to cloak such results in the guise of a partial "waiver" of a purportedly absolute power to suspend cannot be sustained.

The Commission further exceeded its statutory authority by imposing unlawful refund conditions upon petitioners. The suspension provision in the Act specifically authorizes the Commission to require carriers to account for and refund to shippers the portion of a "proposed *increased* rate" which is ultimately found to be excessive; but that provision does not authorize the Commission to require that a carrier refund any portion of its *original* rate which may be found to exceed a rate which is subsequently prescribed. Repayment obligations with respect to unlawful original rates arise under the reparations provisions in sections 8 and 15(1) of the Act; those provisions require a quasi judicial determination by the Commission of the amount of any reparations due. Irrespective of the rate the Commission may fix for the future, a carrier is entitled to its day in court on the question whether its original rates were unlawful at the time they were collected, and if so, what the maximum lawful rate would have been at that time.

ARGUMENT

I.

CONGRESS AUTHORIZED SUSPENSION OF NEW RATES, NOT SUSPENSION OF THE ORIGINAL RATES OF A NEW RAILROAD OR PIPELINE.

The Court of Appeals reached the conclusion that the Interstate Commerce Act empowers the Commission to suspend a part I carrier's original rate, leaving it with no rate. In reaching this conclusion, the court expressed the view that the language of the suspension provision, section 15(7), which authorizes the Commission to suspend "any schedule stating a new . . . rate," has no "plain meaning" (755a-56a); but the court appears to have overlooked the draftsman's careful use of interchangeable terms in the same section, where the term "the proposed change of rate" is subsequently used to refer back to and define the "new . . . rate" whose suspension Congress had authorized.[20]

20. The full text of § 15(7) is set forth in the Statutory Appendix to this Brief. The court's construction of section 15(7) fails to read the statutory provision in its entirety, and distorts the sentences within the provision to derive separate and unlikely meaning. There is no indication that Congress intended the words "the proposed change of rate" in the second sentence to mean something less than "any schedule stating a new individual or joint rate. . . ." See the historical discussion *infra,* Point I B, at 24.

And the Court of Appeals disregarded the policy and purpose of the statute.

The reason Congress authorized suspension of schedules stating a "new" rate was to ensure that service would continue to be available at the old rates, that the status quo of transportation would be preserved during investigation of a change. Congress deemed it fair to the carrier and consistent with due process to require the carrier to postpone a change in rates which it had previously established for itself. Since a carrier is not permitted to transport oil by pipeline in interstate commerce unless it has an effective tariff on file, 49 U.S.C. § 6(7), Congress contemplated suspension only where the carrier could continue its prior rates and services, not where the result would be total blockage of service by a newly constructed railroad or oil pipeline.

A. The Legislative History and Purpose of the Mann-Elkins Act Confirm That Original Rates Were Not To Be Suspended.

As it stood after amendment by the Hepburn Act of 1906,[21] the Interstate Commerce Act contemplated two types of filings: the general filing of all tariffs under section 6(1), and the filing of changed tariffs, thirty days before the effective date of such change, under section 6(3).[22] Those who sought enactment of the legislation which became the Mann-Elkins Act linked the proposed suspension power to the category of changed tariffs which had been established in 1906 by the Hepburn Act. Thus, President Taft, in a message to Congress, pointed out that there was a defect in the Hepburn Act's procedure since "[u]nder the existing law the commission may not investigate an increase in rates

21. Ch. 3591, § 2, 34 Stat. 584, 586.

22. References to a "section" or "sections" are to provisions in Part I of the Interstate Commerce Act, 49 U.S.C. §§ 1-27.

until after it shall have become effective; and although one or more carriers may file with the commission a proposed increase in rates or change in classifications, or other alteration of the existing rates or classifications, to become effective at the expiration of thirty days from such filing, no proceeding can be taken to investigate the reasonableness of such proposed change until after it becomes operative." 45 Cong. Rec. 462 (1910), *reprinted in* H.R. Rep. No. 923, 61st Cong., 2d Sess. 3-4 (1910). Accordingly, the President advocated legislation to permit the commencement of such an investigation before the proposed change took effect and also to give the Commission a power to postpone the effective date of the change while the investigation proceeded. The language of the first sentence of section 15(7), which defines the tariffs which may be suspended, was drafted by the Taft Administration (*see* H.R. Rep. No. 923, 61st Cong., 2d Sess. 5 (1910)) and remains substantially unchanged today:

> Whenever there shall be filed with the commission any schedule stating a *new* individual or joint *rate,* fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice. . . . 36 Stat. 552 (Emphasis added). *Compare* 49 U.S.C. § 15(7).

The reference to a "new . . . rate" undoubtedly has the same meaning in the statute as it possessed in the speeches in which President Taft proposed the legislation. As he explained in Des Moines on September 20, 1909:

> "Under the interstate-commerce law [as modified by the Hepburn Act] a new rate classification is to be filed with the commission. It is proposed now to authorize the commission to postpone the date that such new rate classification is to take effect. This introduces a new element into the act by placing the railroad company in the situation when it proposes to make a change in the rate that it should be prepared to show to the commission affirmatively that *the change to the new rate is justified.*"
> *Reprinted in* 45 CONG. REC. 6789 (1910) (Emphasis added).

The reference in the Mann-Elkins Act to "any schedule stating a new . . . rate" is also directly related to the provision in section 6(3) which required the "printing of new schedules" whenever any tariff was changed.[23] Congress, as well as the President, understood that relationship. As Senator La Follette explained, "[t]he Hepburn law provided that all new rates should be filed, . . . the [Mann-Elkins] bill as reported provides that the Commission shall have but sixty days' time in which to examine these rates before they go into effect, . . . suspending the rate." 45 CONG. REC. 6893 (1910).[24] The Committee reports which

23. Added in § 2 of the Hepburn Act of 1906, ch. 3591, § 2, 34 Stat. 584, 586.

24. As ultimately enacted, the bill authorized suspension, not for 60 days, but for 120 days, followed by a further suspension of as much as six months, if the Commission had not completed its investigation, 36 Stat. 552. In 1917, Congress provided that until January 1, 1920 the Commission could suspend increased rates or fares for an indefinite period. Act of August 9, 1917, ch. 50, § 4, 40 Stat. 270, 272. Congress shortened the suspension period to 150 days in the Transportation Act of 1920 (the Esch-Cummins Act), ch. 91, § 418, 41 Stat. 456, 486-87. In 1927 Congress lengthened the suspension period to the present seven-month maximum. Act of March 4, 1927, ch. 510, § 2, 44 Stat. 1446, 1447-48.

accompanied the administration bill[25] also made clear that the suspension power concerned "a proposed increase in rates, or change in classification." S. REP. No. 355, 61st Cong., 2d Sess. 9 (1910). Suspension was to be a "power to suspend changes in rates pending a hearing upon the propriety of the change." *Id.*, minority statement (Pt. 2) at 9. In hearings before the House Committee on Interstate and Foreign Commerce, ICC Chairman Knapp rejected any suggestion that suspension, as provided in the bill, would give the Commission "the power to initiate rates," pointing out that "the rate is already initiated and there, and has been put in by the railroad." When Representative Richardson suggested that a carrier-initiated rate "has not gone into effect" at the time the Commission exercises its suspension power, Chairman Knapp replied "[o]h, yes. They had a rate before they filed the new tariff."[26]

It was the existence of a presumptively reasonable "old" rate, affording a basis for comparison with the new rate, which made possible a rapid, practical-minded decision whether to suspend, without taking evidence as to the needs of the business.[27] It was the fact that service to the public could continue at a rate previously fixed by the carrier which was thought to make suspension legislation fair both to the carriers and to the public. As the Commission had stated in its annual report for 1908, urging adoption of such

25. H.R. 17536 (The Townsend Bill), S.6737, 61st Cong., 2d Sess. (1910). For the suspension provision as adopted by each chamber see *Comparison of Railroad Commerce Bills,* S. Doc. No. 606, 61st Cong., 2d Sess. at 25-27 (1910).

26. *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 1211 (1910).

27. *See* 3-B I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 463 (1931). "Probably the most important fact in most rate situations is the prevailing position of the charge. Existing rates and their relationships provide a starting-point with reference to which evidence can be considered and which possess a momentum tending to further their continuance."

legislation, "[n]o carrier should be required to reduce its rates without a fair hearing; neither, in our opinion, should the public be required to pay advanced rates without opportunity for a fair hearing." 22 I.C.C. ANN. REP. 11 (1908).[28]

The concern for fairness was widely reflected in Congress. Representative Mann, sponsor of the bill, emphasized that "when the railroad company then files this schedule of rates proposing to increase the rates, we say it is a reasonable presumption that the rate which has existed, possibly for a long time—but whether for long or short, the one in existence—is a fair rate, and should remain in force until the commission has had an opportunity to give some investigation to the subject. That seems to be fair to the railroad company and fair to the shipper." 45 CONG. REC. 4713 (1910). Congress also linked the carrier's right to maintain an existing rate to the due process requirements of the Constitution.[29]

The suspension period which Congress ultimately authorized in 1910 was a maximum of "eleven months" (45 CONG. REC. 6916 (remarks of Senator Jones)), including, as it did, the original thirty-day notice period required by the Hepburn Act, a four-month ("120 days") suspension period, and a further six-month suspension period, if necessary to complete the Commission hearing. It would have been a grave matter to authorize the Commission utterly to

28. *See* 1 I. SHARFMAN, *supra* note 27, at 59-60.

29. *See, e.g.*, 45 CONG. REC. 6504 (1910) ("the railroad having once established a rate, it must be accepted as at least high enough not to confiscate its property, and, I think, high enough to afford a just compensation for its service") (remarks of Senator Bailey); *id.* at 6510 ("if Congress has the power . . . to prescribe a schedule of rates . . . then it may declare that the railways shall not charge more than the rates which are now lawfully in existence") (Senator Cummins); *id.* at 6509 (Senator Crawford); *id.* at 6787 ("we say, as to that which you have fixed as a reasonable compensation for your services, there shall be no change until a tribunal shall have a practicable and a reasonable time within which to determine it") (Senator Borah).

deprive a carrier of the right to operate a new railroad or pipeline during so long a period, and none in Congress suggested that the Mann-Elkins bill would have such a result.[30] In emphasizing the fairness of requiring maintenance of existing rates, Congress manifested an "unwillingness to enact legislation that may be subject . . . to constitutional challenge" (*United States* v. *Witkovich*, 353 U.S. 194, 201 (1957)), and courts should not adopt a statutory construction which might conflict with constitutional policy. *See Blanchette* v. *Connecticut General Insurance Corps.*, 419 U.S. 102, 134 (1974). If the Commission could suspend the original rate of a new railroad or oil pipeline, leaving it with no rate at all and forbidding it to use its property in interstate commerce, then every such suspension would raise constitutional issues. Congress thought it had obviated constitutional issues by requiring maintenance of an existing rate.[31]

In enacting section 15(7), Congress sought "a careful accommodation of the various interests involved" (*United States* v. *Students Challenging Regulatory Agency Pro-*

30. Indeed, Congress expressed no concern about new railroads or pipelines commencing operations at high prices. The mischief to be remedied was the occurrence of abrupt changes in existing rate structures, and the fact that section 6(3) of the Interstate Commerce Act, as amended by the Hepburn Act, did not authorize investigation of such changes until after they had gone into effect. The statutory purpose accordingly limits the meaning of ambiguous terms. *See United States* v. *Champlin Refining Co.*, 341 U.S. 290, 297 (1951) ("[t]he statute cannot be divorced . . . from the evil which Congress sought to correct and prevent"); *Hamilton* v. *Rathbone*, 175 U.S. 414, 419 (1899); *Smith* v. *Townsend*, 148 U.S. 490, 494 (1893).

The rules of statutory construction, with which Congress was familiar in 1910, also required express language to deprive a carrier of its common law rights. *See Shaw* v. *North Pennsylvania R.R.*, 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import"); *ICC* v. *Northern Pacific R.R.*, 216 U.S. 538, 544 (1910). For the carrier's common law right to initiate rates, see, for example, *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 119 (1908).

31. In the instant cases the record provides no means to calculate the loss that would be incurred if a pipeline, constructed at a cost of some $9 billion, were required to remain idle for seven months. The carriers attempted to minimize those losses by commencing operations

cedures ("SCRAP I") 412 U.S. 669, 697 (1973)), "allocat-[ing] the benefit and harm of suspension." *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade,* 412 U.S. 800, 823 (1973). The rulings below "would disturb this careful balance of interests." 412 U.S. at 697. If the carrier incurs loss during a lawful suspension period, it is not allowed to pass on that loss to subsequent users of the regulated service.[32] So far as the public was concerned, Congress may well have thought that commencement of service on a new line at possibly "high" rates was preferable to blockage of all service, particularly since the Hepburn Act held out the promise of full reparations, plus interest and attorney's fees, once the Commission had held its full hearing and determined whether the carrier's rate was indeed excessive.

B. In 1920, Congress placed an "Authoritative Gloss" on Section 15(7), Confirming Its Intention That Only a "Proposed Change" Could Be Suspended.

When Congress amended section 15(7) in 1920,[33] it placed an "authoritative gloss"[34] on the 1910 definition of the

at the interim rates fixed by the Commission, but uncontroverted evidence indicated that such operation resulted in net loss. 650a-52a.

The lack of procedural safeguards contributed to Commission error in assuming a throughput of 1.2 million barrels per day for purposes of ascertaining an interim rate, when the data before the Commission indicated that throughput during a 7 month start-up period would necessarily be much lower. In fact, average throughput is little more than half that rate. *See* note 14, *supra* at 10. The carriers cannot ship enough oil to earn even the revenues to which the ICC found they were entitled. *See* 578a-93a.

32. *See Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.,* 284 U.S. 370, 387-388 (1932); *FPC* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 152 (1962); *Hope Nautral Gas Co.* v. *FPC,* 196 F.2d 803 (4th Cir. 1952).

33. Transportation Act of 1920 (Esch-Cummins Act), ch. 91, § 418, 41 Stat. 486.

34. For examples of an "authoritative gloss," see *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481, 501 (1968); *Utah Junk Co.* v. Porter, 328 U.S. 39, 42 (1946); *United States* v. *Florida,* 363 U.S. 121, 132 (1960) (Frankfurter, J., concurring); *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 685 (1954) (Frankfurter, J., concurring).

tariffs which might be suspended. While the 1910 Act had referred to "any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge," the 1920 amendment referred to the entire enumeration as "the proposed change," providing that "[i]f the proceeding has not been concluded and an order made [within the period of suspension], *the proposed change of rate, fare, charge, classification, regulation or practice* shall go into effect at the end of such period. . . ." Transportation Act of 1920 (Esch-Cummins Act), ch. 91, § 418, 41 Stat. 456, 486-87 (emphasis added).[35] In other words, Congress understood the statutory reference to the filing of any "new" rate, fare, charge, classification, regulation or practice to be the same as "the proposed change of [any] rate, fare, charge, classification, regulation or practice." When Congress made that understanding express by statutory amendment in 1920, it placed an authoritative gloss upon the statute—a gloss which is of course consistent with the intention expressed in the legislative history of the 1910 enactment. *See Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367, 380-81 & n.8 (1969) (subsequent amendment of § 315 of the Federal Communications Act showed Congress' intention as to requirements of that section). "[I]f it can be gathered from a subsequent statute *in pari materia,* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States* v. *Freeman,* 44 U.S. (3 How.) 556, 564 (1845). *See N.L.R.B.* v. *Bell Aerospace Co. Divi-*

35. In the quoted clause, Congress merely restated the substance of prior law, but it went on to enact a special accounting and refund provision, discussed in Point IV *infra,* which is applicable when increased rates go into effect at the end of a suspension period, before the completion of a hearing. The 1920 amendment shortened the maximum suspension period to five months, and the special refund provision was intended to give a countervailing protection to shippers.

sion of Textron, Inc., 416 U.S. 267, 275 (1974) ("significant weight"); *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-44 (1972) ("great weight").[36]

C. Agency Practice Confirms that Original Tariffs May Not Be Suspended.

The Interstate Commerce Commission itself never asked Congress for authority to suspend the original tariffs of new railroads and pipelines.[37] Not until the instant case did the Commission assert that the 1910 enactment had given it such power. Indeed, the Commission indicated in

36. The legislative history of the 1920 enactment indicates the understanding of Congress that the schedules to be suspended were those containing a "proposed change of rate" required to be filed on 30 days notice pursuant to § 6(3). *See* H.R. REP. No. 456, 66th Cong., 1st Sess. at 20-21 (1919). Describing § 15(7) as enacted in 1910, the sponsor of the 1920 amendment (Representative Esch) noted that "where an application for an increase of rates or rate structures is made not less than 30 days are allowed for such notice. The commission, under existing law, can suspend the rates so filed . . ." 58 CONG. REC. 8317 (1919). *See also* 59 CONG. REC. 143 (1919) (Sen. Cummins) (linking operation of § 6(3) and § 15(7)). When the 69th Congress altered the period of suspension in 1927 it also appeared to believe that the suspension power had application only where "a carrier wants to change a given rate." 67 CONG. REC.12757 (1926) (remarks of Rep. Newton).

37. In its report for 1909, the Commission had urged that "some method should be provided by which railroads can be prevented from advancing their rates or changing their regulations and practices to the disadvantage of the shipper, pending an investigation into the reasonableness of the proposed change." 23 ICC ANN. REP. 6 (1909). *See also* 21 ICC ANN. REP. 9-10 (1907). In testimony before Congress on behalf of the Commission, Judge Clements had explained that the suspension power "is simply holding that rate then made in statu quo, and when they ask to increase it asking the reason for it. . . . The suspension in this case is simply to hold things where they are until you find out what ought to be done." *On Bills Affecting Interstate Commerce: Hearings before the Comm. on Interstate & Foreign Commerce of the House of Representatives*, 61st Cong., 2d Sess. 1271 (1910). *See* 1 I. SHARFMAN, INTERSTATE COMMERCE COMMISSION 58 (1931).

a 1930 decision that it was "without jurisdiction" to suspend a carrier's original tariff for service on a railway extension not previously served by that carrier. *Restriction in Routing Between Greenwood and Augusta*, 165 I.C.C. 3 (1930), *aff'd sub nom. Atlantic Coast Line Railroad* v. *United States*, 48 F.2d 239, 245 (W.D.S.C. 1931), *aff'd*, 284 U.S. 288 (1932). And as early as 1912 the Commission took note of the inherent unfairness of any suspension that would leave a carrier without any lawful rates in effect. *See In re Wharfage Charges of the Galveston Wharf Co.*, 23 I.C.C. 535, 537 (1912).[38] Current Commission regulations presuppose that "the previous tariff and effective supplements are continued in effect and remain in effect during the period of suspension." 49 C.F.R. § 1300.9(k)(5) (1976).[39]

38. Other Commission decisions are consistent. In *Discontinuance of Inland Stations In New York City*, 173 I.C.C. 727, 729-30 (1931) the full Commission construed § 15(7) as "not limited to increased rates, but . . . [to] any tariffs filed by carriers changing their present practices or rates." *See Maximum Rate Provision, Ocean-Rail to Southwest*, 258 I.C.C. 63, 64-65 (1944); *Salt from Louisiana Mines to Chicago*, 69 I.C.C. 312, 313 (1922) (Sec. 15(7) gives authority over any " 'new' rate, whether it be increased or decreased.").

39. It is true that the Commission has developed a special category of "initial rates," a term which it uses to refer, not to original rates filed under § 6(1), but to rates for somewhat novel services, which themselves constitute a "new . . . classification" or "new . . . practice" by the carrier, and which must be filed under § 6(3). This special category has developed because, as enacted in 1910, § 15(7) placed upon the carrier "the burden of proof to show that the increased rate or proposed increased rate is just and reasonable." 36 Stat. 552. Carriers who proposed to decrease their rates or introduce a "new . . . classification" or a "new . . . practice," as by offering a somewhat novel service, did not have to sustain this burden of proof, since it was the "classification" or "practice" that was "new," while the rate itself was "initial," not "changed." In 1940, Congress amended the statute to place on the carrier the burden of justifying any "changed rate," but the carrier is not required to bear the burden of justifying a changed classification or practice. Transportation Act of 1940, ch. 722, § 10(c), 54 Stat. 912. A review of these burden of proof cases, in which the Commission has sought to define its category of initial "rates," confirms that they actually concern changes in prior classifications or practices. *See, e.g., Cotton from New Orleans*, 49 I.C.C. 751 (1918) (carrier changed former practice and filed separate rate

The Federal Power Commission, which administers suspension provisions of the Natural Gas Act and the Federal Power Act (15 U.S.C. § 717c(e) and 16 U.S.C. § 824d(e)) which are phrased in terms virtually identical to those of section 15(7), established by rule thirty years ago that it is without authority to suspend "initial rates" (18 C.F.R. §§ 2.4(d), 2.52 (1977)), and that commission uses the term to mean original rates, such as those of a natural gas company commencing interstate operations under a certificate of public convenience and necessity, which do not "supersede, supplement, cancel or otherwise change" schedules previously on file. 18 C.F.R. § 35.1(b) (1977). *See Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 146 (1960) ("when a producer commences interstate sales from a particular field . . . there are by definition no existing rates, and accordingly [the suspension provisions], which are bottomed on delaying the effectiveness of, and suspending, changes, are not relevant").[40]

D. If Congress Has Authorized Prior Review of Original Rates In Other Statutes Regulating Other Carriers, This Is Only As An Adjunct of Agency Licensing Power.

Although the Court of Appeals could find no "insight" in the legislative history of section 15(7) (756a), it nevertheless thought it significant that, after enactment of the

for delivery at a city, rates to which were previously ascertained as a proportion of the rates to a point beyond); *Rail-Water, Grain In Bulk, Mo., Ill. and Ind. to Buffalo,* 321 I.C.C. 564 (1963) (carriers with prior individual tariffs filed joint "initial tariff" for new combined service); *Animal Feed from Mississippi and Tennessee to Midwest and Southwest,* 316 I.C.C. 94 (1962) (established motor carrier which had been transporting fertilizer filed "initial rates" for carriage of feed on same route); *Bituminous Coal via Motor-Rail from Lynnville, Ind., to Chicago, Ill.,* 313 I.C.C. 573 (1961) (established carriers filed "initial" joint rate for through transport of coal).

40. *See also FPC* v. *Hunt,* 376 U.S. 515 (1964); *Bel Oil Corp.* v. *FPC,* 255 F.2d 548, 554 (5th Cir.), *cert. denied,* 358 U.S. 804 (1958); *Phillips Petroleum Co.* v. *FPC,* 258 F.2d 906, 917 (10th Cir. 1958).

Mann-Elkins Act, subsequent Congresses which enacted similar suspension provisions had sometimes taken care to provide by specific language that original tariffs were not subject to suspension, and concluded that the absence of such a negative proviso in the Mann-Elkins Act meant that Congress had authorized the Commission to suspend the original rates of new railroads and pipelines. 756a-57a. But the absence of such a negative proviso in section 4 of the Natural Gas Act (15 U.S.C. § 717c(e)) and section 205 of the Federal Power Act (16 U.S.C. § 824d(e)) has never been thought to imply that Congress wished to authorize suspension of original rates under those Acts. *See* discussion *supra* at 28. And the latter-day history of the other provisions, in which Congress did insert such negative provisos, merely shows that when Congress has focused its attention on the question whether the suspension power might be used to block service by a new entrant, Congress has been concerned to ensure that it should not be so used. *See, e.g.,* Federal Aviation Act § 1002, 49 U.S.C. § 1482(g). The fact that subsequent Congresses sought to avert such an interpretation in connection with other statutes provides no basis for inferring that Congress intended such an interpretation in 1910.[41]

In the case of motor carriers, water carriers and freight forwarders, Congress specifically barred the suspension of original rates only when those rates were filed prior to certain cut-off dates, and therefore it may be contended that, by negative implication, those statutes authorize the Interstate Commerce Commission to suspend the original rates of those other carriers if filed after those dates. But the dates in question correspond to the dates after which new entry in those industries is conditioned on the Commission's

41. *See United States* v. *Price,* 361 U.S. 304, 313 (1960); *Rainwater* v. *United States,* 356 U.S. 590, 593 (1958); *Fogarty* v. *United States,* 340 U.S. 8, 13-14 (1950). The legal views of a subsequent Congress become significant only if that Congress amends the statute in question so as to elevate such views to the status of positive law, as Congress did in amending § 15(7) in 1920. *See* Point I. B., *supra.*

prior grant of a certificate of public convenience and necessity. And any intention of Congress not to forbid suspension of original rates after those dates would reflect no more than a desire to give the Commission plenary licensing authority.[42] Prior to granting such a certificate the agency reviews and approves the new entrant's original rates. *See Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959); *Federal Power Commission* v. *Sunray DX Oil Co.,* 391 U.S. 9 (1968).[43]

In 1910 Congress was well aware of state legislation in New York and Wisconsin which authorized regulatory bodies to issue or withhold a certificate of public convenience and necessity, and it considered granting the Interstate Commerce Commission the authority "to determine whether a line shall be constructed".[44] Congress ultimately enacted such legislation in respect of new railroad lines in 1920. Transportation Act of 1920, ch. 91, § 402, 41 Stat. 477. But it has never authorized the Commission to grant

42. *See* 49 U.S.C. §§ 316(g) and 306(a)(1) (motor carriers); 907(g), (i) and 909(a) (water carriers); 1006(e) and 1010(a)(1) (freight forwarders). The same rationale explains the recent decision of Congress to authorize suspension of original rates of carriers under the Federal Communications Act, 47 U.S.C. § 204, since the FCC already had power to block commencement of operations under that act by withholding a certificate of public convenience and necessity, 47 U.S.C. § 214.

43. Since the Interstate Commerce Commission has already reviewed the proposed original rate of a motor carrier, water carrier or freight forwarder at the time it issues a certificate of public convenience and necessity (*see, e.g., West Coast Bus Lines, Ltd., Common Carrier Application,* 41 M.C.C. 269, 272, 285, 291 (1942), *aff'd sub nom. North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N.D. Calif.), *aff'd in part and dismissed in part,* 323 U.S. 668 (1944)), it would be inconsistent for it then to "suspend" that rate. Congress probably did not intend to authorize the Commission to use its licensing and suspension powers in an inconsistent manner. The principal purpose of the "grandfather" clauses in these other statutes may have been to assure that motor carriers, water carriers and freight forwarders, all of whom were being brought for the first time under federal jurisdiction, could "change" their existing tariffs so as to fit them for filing under the required federal format, but not run the risk of suspension as a result of any formal change in practices or classifications.

44. *On Bills Affecting Interstate Commerce: Hearings before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 581 (1910) (Remarks of Mr. Esch). *See id.* at 1090 (Mr. Barrett).

a certificate of public convenience and necessity in respect of new oil pipelines.[45] Construction of the Trans-Alaska Pipeline System was authorized by Congress itself (43 U.S.C. §§ 1651-55), and the vast investment in that pipeline was made in reliance upon that authorization and upon the general rule of the Interstate Commerce Act that rates are to be fixed in the first instance by the carrier, subject to revision by the Commission only after full hearing and upon a record which permits judicial review. *Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP II"), 422 U.S. 289, 311 (1975). *See Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944). Congress could not have intended that suspension should be used as a power to license railroads and oil pipelines since the investor's decision to construct such lines had to be made and carried out before any question of suspending an original tariff could arise.[46] Under the Congressional plan, even where an agency is authorized to grant or withhold a license, its decision must be supported by substantial evidence, upon a record which allows judicial review. *E.g., Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962); *Interstate Commerce Commission* v. *J-T Transport Co.,* 368 U.S. 81, 93 (1961). *See Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281 (1974).

45. The absence of such a requirement implies that Congress thought it unnecessary to require prior review of an oil pipeline's original rate, particularly since reparations were available if the rate was ultimately found to be excessive. The Natural Gas Act contained no reparations provision (*FPC* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944)) and accordingly it was essential, under the plan of that act, that the Federal Power Commission review the rates of a natural gas pipeline before issuing a certificate of public convenience and necessity. *Atlantic Refining Co.* v. *Public Service Commission of N.Y.* ("*CATCO*") 360 U.S. 378 (1959). *See United Gas Improvement Co.* v. *Callery Properties, Inc.,* 382 U.S. 223 (1965).

46. Agency jurisdiction over a common carrier by oil pipeline arises only after actual commencement of transportation operations. 49 U.S.C. § 1(1). *See Schmitt* v. *War Emergency Pipelines, Inc.,* 175 F.2d 335 (8th Cir.), *cert. denied,* 338 U.S. 869 (1949); *Pennsylvania R.R.* v. *Public Utility Commission of Ohio,* 298 U.S. 170 (1936); *Southern Ry.* v. *Prescott,* 240 U.S. 632 (1916); *Southern Ry.* v. *Reid,* 222 U.S. 424 (1912).

II.

THE SUSPENSION POWER MAY BE EXERCISED ONLY IN ACCORDANCE WITH THE PURPOSE OF CONGRESS, TO ENSURE MAINTENANCE OF THE STATUS QUO PENDING INVESTIGATION OF NEW RATES.

Even if the original rate of a new oil pipeline or railroad were regarded as a "new" rate which could be suspended under the statute, the Commission is authorized to suspend only to effectuate the statutory purpose, *i.e.*, to maintain the status quo of transportation pending an investigation. The Commission itself has always considered the suspension power as "an emergency measure to preserve the *status quo* until determination can be had as to whether certain proposed acts are legal." *Vulcan Detinning Co.* v. *New York Central Railroad,* 203 I.C.C. 260, 261 (1934). *See Class Rates Between Stations in Louisiana,* 33 I.C.C. 302, 303 (1915). This is the position that the Commission has taken before the courts. *See Ferguson-Steere Motor Co.* v. *United States,* 126 F. Supp. 588, 590 (N.D. Tex. 1954) ("serves only as an interim action, to preserve the status quo while the Commission is making the investigation"). And this is the intended purpose of suspension as Commission representatives explained it to Congress before enactment. Suspension was to be "simply holding that rate then made in statu quo, and when they ask to increase it asking for the reason for it . . . simply to hold things where they are until you find out what ought to be done."[47] The purpose of suspension under related statutes is of course the same.[48]

47. Testimony on behalf of the Commission by Judge Clements, *On Bills Affecting Interstate Commerce: Hearings before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 1271 (1910).

48. *See Phillips Petroleum Co.* v. *FPC,* 227 F.2d 470, 474 (10th Cir. 1955) ("[t]he obvious purpose for granting suspension powers to the [Federal Power] Commission was to provide a status quo of five months during which the Commission could investigate the reasonableness of the proposed new rate schedule"); *Hope Natural Gas Co.* v. *FPC,* 196 F.2d 803, 809 (4th Cir. 1952) ("maintenance of the status quo"). *See Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137, 146 (1960) ("bottomed on delaying the effectiveness of, and suspending, changes").

The essential prerequisite to any suspension is a finding, often implicit rather than express, that it is preferable in the public interest that the status quo be maintained pending an investigation rather than that the proposed change take effect at once.[49]

In the instant cases, the Commission found, without taking evidence, "that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates" (626a), but it did not find that it was preferable in the public interest to defer commencement of service through the pipeline rather than to allow service at the rates fixed by the carriers. Indeed, the Commission held just the opposite, stating expressly that it would be "contrary to the interests of all concerned" to postpone commencement of service on the Trans Alaska Pipeline. 629a. But the Commission suspended the tariffs anyway, on the assumption that it could thus coerce the carriers into filing different tariffs at rates fixed by itself.

49. The Mann-Elkins Act requires that the Commission provide "a statement in writing of the reasons for its suspension" and the Commission has often limited itself to a statement that "the rights and interests of the public would be injuriously affected" by the change. *See Ferguson-Steere Motor Co.* v. *United States,* 126 F. Supp. 588 (N.D. Tex. 1954). The Commission has sometimes gone further. *See, e.g., In re The Request for Suspension of Reduced Rates on Packing-House Products And Fresh Meats From Fort Worth, Tex. to Mississippi River Crossings and Points East Thereof,* 21 I.C.C. 68, 70 (1911) ("[a] prima facie case clearly and affirmatively persuasive should be presented before the power to suspend is exercised"); *Board of Trade of Chicago* v. *Illinois Central R.R.,* 26 I.C.C. 545, 552 (1913). *Compare Amarillo-Borger Express, Inc.* v. *United States,* 138 F. Supp. 411, 414 (N.D. Tex. 1956), *vacated as moot,* 352 U.S. 1028 (1957) ("There is reason to believe that [the proposed changes] . . . would be unjust and unreasonable . . .").

The Court of Appeals reasoned that the Commission had absolute discretion whether to suspend and that, as a "valid corollary" of such power, it might impose such conditions as it pleased. But Congress could not have intended to confer absolute discretion since it required the Commission to give a written statement of the reasons for its action.[50]

There can be no doubt that a suspension decision which is, on its face, based on unlawful reasons can be reviewed and reversed, for the legislative history provides no "clear and convincing evidence" that Congress wished to cut off the right of review. *See, e.g., Dunlop* v. *Bachowski,* 421 U.S. 560, 567 (1975). The decisions of the District of

50. *See* 45 CONG. REC. 6500 (1910) ("it must be true that the Commission shall have some reason for suspending these rates, because this section . . . requires the Commission to state to the carrier or carriers the reason for suspending the rate") (Sen. Cummins). ". . . [T]he authority they have is to ascertain the fact where Congress has declared that a certain fact shall be the guide. . . . We can not confer upon the Interstate Commerce Commission legislative authority except for the purpose of carrying out the administrative determination of the fact which we have declared shall be the guide." *On Bills Affecting Interstate Commerce: Hearings Before the Comm. on Interstate & Foreign Commerce of the House of Representatives,* 61st Cong., 2d Sess. 440 (remarks of Rep. Mann).

The cases rejecting judicial review of suspension rulings have usually concerned a decision *not* to suspend, holding only that courts have no injunctive power to defer rate changes. *See, e.g., SCRAP I,* 412 U.S. 669, 691 (1973) (Congress "deliberately extinguished judicial power to grant [injunctive relief]"); *Arrow Transportation Co.* v. *Southern Ry.,* 372 U.S. 658, 669 (1963) ("[o]ur holding today . . . means only that the injunction remedy is not available . . . ."). A decision not to suspend need not be supported by stated reasons, and such a decision is unlikely to result in irreparable harm since the shipper retains his remedy by way of reparations. But the Court has specifically left open the question whether the Commission's exercise of the suspension power may itself be subject to judicial review. *SCRAP I,* 412 U.S. 669, 698 n.22 (1973). The sounder view in the lower courts would permit review of suspension orders for gross abuse of discretion. *See, e.g., Naph-Sol Refining Co.* v. *United States,* 269 F. Supp. 530 (W.D. Mich. 1967) (three-judge court); *Long Island R.R.* v. *United States,* 193 F. Supp. 795 (E.D.N.Y. 1961) (three-judge court, per Friendly, J.); *Freeport Sulphur Co.* v. *United States,* 199 F. Supp. 913 (S.D.N.Y. 1961). This Court remanded for such a review in *United States* v. *Chesapeake & Ohio Ry.,* 426 U.S. 500 (1976).

Columbia Circuit have recognized a distinction between *bona fide* suspensions consistent with the purpose of Congress and " 'sham' suspensions aimed at coercing behavior rather than merely preserving the status quo pending investigation." *Continental Airlines, Inc.* v. *Civil Aeronautics Board,* 522 F.2d 107, 129 (D.C. Cir. 1975). *See Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 543 F.2d 247 (D.C. Cir. 1976); *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970). *See also American Telephone & Telegraph Co.* v. *Federal Communications Commission,* 487 F.2d 865, 874-75 (2d Cir. 1973). Commission action in the instant case was a clear example of such a "sham" suspension.

In *United States* v. *Chesapeake & Ohio Railway* ("Chessie"), 426 U.S. 560 (1976), this Court reviewed and upheld conditions which had originally been proposed by the carriers. These conditions were held to be "carefully tailored" to the asserted needs of the carriers, which the statute required them to explain in supporting the burden of proof that increased rates were justified. 49 U.S.C. § 15(7). And the Commission had held in that case that it was preferable to defer any increase rather than to permit the carriers to raise the rates without any assurance that the increment would be spent in accordance with the asserted need.[51] Having made that determination, the Commission was free to intimate that "a more measured course . . ."—acceptance of conditions that would ensure expenditure of the funds as represented by the carriers—would make the increase preferable to the status quo.[52] In the instant case,

51. " '[I]f the schedules were permitted to become effective as filed and without conditions designed to promote service improvements, the increases proposed would be unjust and unreasonable and contrary to the dictates of the national transportation policy. . . .' " 426 U.S. at 503.

52. *Compare Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971), in which the Commission held that maintenance of service at existing rates was preferable to immediate inauguration of the higher, new rates, but intimated that maintenance of the status quo would not be insisted upon if the carrier filed a tariff providing for more modest increases.

however, the Commission made no finding that it would be preferable to defer operation of the Trans Alaska Pipeline rather than to commence operation at the carriers' original rates. And instead of suggesting an alternative that was "carefully tailored" to allow some improvement over a rate previously initiated by the carriers, the Commission fashioned its own rates, rough-hewn out of whole cloth. It compelled the carriers to commence operations at rates well below any they had ever endorsed.

The Commission asserted in the instant case that if it were required to choose between maintenance of the status quo and adoption of the change in service as proposed by the carrier, the suspension power "would be a substantially less satisfactory tool for serving the public interest." 629a. But this is the choice that the statute requires when a suspension decision is made. Suspension would not be a "satisfactory tool" at all if the Commission were free to disregard the choice between carrier-initiated rates and status quo, and to impose, without evidentiary basis, ill-considered rates of its own, which may result, as here, in irretrievable loss and damage to the national transportation system.

III.

THE SUSPENSION POWER MAY NOT BE USED TO CIRCUMVENT THE PROCEDURAL SAFEGUARDS TO WHICH CONGRESS HAS SUBJECTED THE COMMISSION'S RATE MAKING POWER.

In the instant case the Commission did not merely abuse the suspension power by exercising it otherwise than to preserve the status quo. It went further, using the suspension power to compel adoption of interim rates which it fixed for itself in a summary procedure, without taking evidence, in total disregard of the procedural requirements for ratemaking which Congress laid down in the Hepburn Act. In so doing, the Commission deviated from the Con-

gressional plan, which contemplates that carriers shall be allowed to operate either at rates freely chosen by themselves or at rates fixed by the Commission after full hearing, with due process of law.

The power to prescribe rates has traditionally been regarded as "a power of supreme delicacy and importance," *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway,* 167 U.S. 479, 505-06 (1897) ("Maximum Rate Case"). The Interstate Commerce Act has never deprived the carrier of the common law right "to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise." *United States* v. *Illinois Central Railroad,* 263 U.S. 515, 522 (1924). *Accord, Aberdeen & Rockfish Railroad* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP II"), 422 U.S. 289, 311 (1975); *United States* v. *Students Challenging Regulatory Agency Procedures* ("SCRAP I"), 412 U.S. 669, 672 (1973).

Under the Interstate Commerce Act, the Commission's power to set rates arises only when rates are examined and determined to be unlawful "after full hearing." 49 U.S.C. § 15(1). As early as 1887 Congress authorized the Commission to determine whether rates established by carriers were excessive, and to require payment of reparations.[53] But when it was contended, in the *Maximum Rate Case,* that the power to determine whether rates were excessive necessarily "implied" a power to fix the rates that would be acceptable for the future, this Court rejected any such notion:

> "The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative

53. Act to Regulate Commerce, ch. 104, §§ 1, 8, 24 Stat. 379, 382 (1887).

> mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."
> 167 U.S. at 494-95.

The Court emphasized that:

> "The power to prescribe . . . rates . . . is a legislative and not an administrative or judicial function .... That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language .... Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication carry to the commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future.... [T]he clear language of § 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increases or reduction may be made . . . specif[ies] the scope and limit of [the commission's] functions in this respect, [and] strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission."
> 167 U.S. at 505-06.

Thereafter, upon enactment of the Hepburn Act in 1906, Congress did confer upon the Commission the power to prescribe maximum rates, but only "after full hearing." 49 U.S.C. § 15(1).[54] But when Congress enacted the Mann-Elkins Act in 1910, it did not authorize deviation from the procedures for rate making that it had established in the Hepburn Act.[55] In 1920, when Congress perceived the problems of emerging competition among differing modes of transportation, it authorized the Commission to establish minimum rates as well, but again, only "after full hearing." *Id.*[56]

54. The Hepburn Act of 1906, ch. 3591, § 4, 34 Stat. 584, 589.

55. The Mann-Elkins Act provided that only "after full hearing" may the Commission make, with respect to a suspended rate, "such order in reference to such rate . . . as would be proper in a proceeding initiated after the rate . . . had become effective." This means that the Commission may prescribe a different rate under § 15(7), just as it can under section 15(1).

Congress has never conferred upon the Commission a power to prescribe, without hearing, interim rates to apply during the period that it has suspended carrier-initiated rates. The Commission's assumption of an "implied" power in this case is very much like the assumption of power which this Court condemned in the *Maximum Rate Case,* and Congress adopted the Hepburn and the Mann-Elkins legislation with that decision in mind.

The rule against implicit delegations of important powers was more recently reaffirmed in *Civil Aeronautics Board* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961), where the Court held that "the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.... [The Board] must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act." 367 U.S. at 334.

The procedure Congress has "specifically authorized" with respect to prescription of an oil pipeline carrier's rates is the "full hearing" provided for in Section 15(1).[57] Such a hearing must afford a right to introduce testimony and to be fully apprised of the evidence submitted or to be considered, and an opportunity to conduct discovery and offer evidence by way of explanation or rebuttal. *Interstate*

56. The Transportation Act of 1920, ch. 91, § 418, 41 Stat. 456, 484-85. *See* 49 U.S.C. § 15(1).

57. "The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority . . . operates in a field limited by constitutional rights and legislative requirements. Its duty under [section] . . . 15(1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates . . . has not been changed. . . . In the discharge of its duty, a fair hearing is a fundamental requirement." *Atchison, T. & S.F. Ry.* v. *United States,* 284 U.S. 248, 262 (1932).

Commerce Commission v. *Louisville & Nashville Railroad,* 227 U.S. 88, 91, 93 (1913). In addition, there must be evidence adequate to support pertinent and necessary findings of fact. *Morgan* v. *United States,* 298 U.S. 468, 480 (1936). At a minimum the Commission should be required to provide fair and reasonable procedures which result in a reasoned decision of controverted issues upon a record which permits judicial review. *See Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-74 (1962); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad,* 294 U.S. 499 (1935).

The power to prescribe rates is an "extraordinary power," and the right to a hearing prior to the exercise of that power is described as an "inexorable safeguard." *Morgan* v. *United States,* 304 U.S. 1, 15 (1938). An administrative agency, as "the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed." *Morgan* v. *United States,* 298 U.S. 468, 479 (1936). And where Congress has required that a full hearing precede a rate prescription, "the granting of that hearing is a prerequisite to the making of a valid order." 298 U.S. at 473.[58]

The Court of Appeals sought to characterize the establishment of the interim rates here at issue, not as rate-making but as a "partial waiver" of a supposed absolute power to forbid the new carriers to conduct operations upon their pipeline. But we have already shown that the Commission had neither arbitrary nor absolute power, but only such power as Congress had given it, to be exercised in accordance with the Congressional purpose. Congress itself had authorized the construction of the pipeline, and under the Constitution it is doubtful indeed that the carriers could have been forbidden to use their property, on arbitrary

58. *See Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 304 (1937) ("The right to such a hearing is one of 'the rudiments of fair play'. . . ."); *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.,* 302 U.S. 388, 393 (1938).

grounds, for a seven-month period. The necessary and intended effect of the Commission order was to compel the carriers to adopt the interim rates which had been fixed by the Commission, and the Bureau of Investigations and the Antitrust Division went so far as to suggest that the carriers might face criminal prosecution if they did not adopt those rates.[59]

As Circuit Judge Roney observed in dissent, "[t]his is ratemaking. We should not hide from that fact." 762a. In cases of far less blatant coercion, courts have not hesitated to declare that "[a] suspension decision which effectively blackmails the carriers into submitting agency-authorized rates is functionally indistinguishable from an agency order setting those rates and such orders are, of course, judicially reviewable." *Students Challenging Regulatory Agency Procedures* v. *United States,* 346 F. Supp. 189, 197 (D.D.C. 1972), *rev'd on other grounds,* 412 U.S. 669 (1973). And in *Moss* v. *Civil Aeronautics Board,* 430 F.2d 891 (D.C. Cir. 1970), the court held unlawful an agency order in which the board had suspended proposed tariffs but decreed the rates which it would accept, causing the carriers to adopt and file those rates as their own. The District of Columbia Circuit held that "[i]t would be blinking reality to hold, as the Board argues, that the order . . . did no more than suspend and initiate an investigation of the rates proposed by the carriers . . . . The Board did all that it could, short of formally styling its order as rate making, to induce the carriers to adopt the proposed rates." 430 F.2d at 897-98.[60]

59. *See* discussion *supra* at 8-9.

60. The rate which the Board imposed in *Moss* was a "permanent" rate, but the carriers were free to seek to revise it upward at any time. The principle is the same whether the disguised ratemaking results in a "permanent" or "interim" rate, as here. In *Moss* and *Port of New York Authority* v. *United States,* 451 F.2d 783 (2d Cir. 1971), members of the public complained about agency action in telling the carriers what rates would not be suspended. The carriers themselves made no complaint in those cases since the agency allowed them a partial increase over the rates which they had previously fixed for themselves, and they were free to seek further increases.

The Commission's Order and the Fifth Circuit's opinion reflect an approach parallel to that rejected in *Moss*. As in *Moss*, "[i]t would be blinking reality" to conclude that authorization of tariffs at the specified interim rate constitutes anything less than the *de facto* prescription of rates by the Commission without a full and fair hearing.

IV.

THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY IN REQUIRING THE CARRIERS TO UNDERTAKE TO REFUND AMOUNTS COLLECTED IN EXCESS OF THE RATE TO BE PRESCRIBED.

The Commission conditioned the right of the carriers to operate at the interim rates it had prescribed on their undertaking to "refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission . . . " 638a.[61] Section 15(7) provides that when "a proposed *increased* rate or charge" which was previously suspended goes into effect prior to completion of a Commission investigation, the Commission may order the carrier to account for and refund any portions of "such *increased* rates or charges as by [Commission] decision shall be found not justified." 49 U.S.C. § 15(7).[62] But the statute makes no such special provision for recovery of any portion of an original rate or a decreased rate, such as the interim rates. When the shipper claims reparations in respect of such rates, his rights and remedies are not governed by this special refund provision of section 15(7) but by the other provisions

61. Such undertaking was to remain in effect even after the suspension period, when the carriers' original rates were to take effect pending completion of the Commission's investigation and hearing. 638a.

62. *See* Transportation Act of 1920 (Esch-Cummins Act), ch. 91, § 418, 41 Stat. 456, 486-87.

of the Interstate Commerce Act. *See* 49 U.S.C. §§ 8, 13, 16. It was clear error for the Commission to expand a provision which Congress expressly limited to a narrow class of cases.

The Commission itself had doubts about this aspect of its order. At a closed meeting of the Commission, its General Counsel described the Commission's authority to impose such a requirement in the instant cases as "doubtful", but concluded that "insofar as the refund provision is made a condition of the willingness of the Commission to accept a lower filed rate in the interim, that may get us over that hurdle." Another staff member referred to the refund provision as a "sort of quid pro quo for allowing [the carriers] to have these interim rates." That same staff member then advised the Commission that "[t]he problem with the refund provision is our statutory authority is somewhat questionable. . . . [T]he statute refers to refunds in the case of increased rates. Here you have initial rates, but if we do it as part of allowing interim rates instead of a suspension, I think we're within reasonable limits."[63]

The Court of Appeals also expressed doubt, but it upheld the condition as "a valid corollary to the suspension power, which we lack jurisdiction to review." 761a. It was error, however, to expand a provision which Congress has expressly limited. And it was also error to require the carriers to waive their right to have the amount of any reparations determined in accordance with the procedures established by law. The fallacy in the Court of Appeals' reasoning was its assumption that a power to impose conditions is a lesser power included within the greater power to suspend rates. The imposition of conditions is a distinct exercise of power which must be reviewed and judged on its own merits. *See* Note, *Unconstitutional Conditions*, 73

63. The transcript here quoted is reproduced in relevant part in Appendix B to the Petition for Certiorari of ARCO Pipe Line Co. (No. 77-602). A certified copy of the full transcript has been lodged with the Clerk.

Harv. L. Rev. 1595, 1609 (1960). Such conditions should be set aside where, as here, they plainly conflict with the intent of Congress.

Attempts by legislative bodies to utilize a similar theory as a basis for conditioning the extension of governmental benefits upon the surrender of constitutional rights have been repeatedly rejected by this Court. The doctrine of unconstitutional conditions holds that a "constitutional power cannot be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co.* v. *Foster,* 247 U.S. 105, 114 (1918).[64] There is no sound reason why these principles should apply with less force to situations in which the agency has sought to compel "voluntary" acceptance of conditions in order to evade statutory, rather than constitutional, limitations upon its authority.

By conditioning the non-suspension of the tariffs upon the inclusion of an unlawful refund provision, the Commission has purported to deprive the carriers of their right to have their liabilities determined and assessed pursuant to the statutory scheme. Under the Act, a carrier is required to pay reparations equal to the amount by which its tariff exceeded the maximum lawful rate for the period of service,

64. *E.g., Graham* v. *Richardson,* 403 U.S. 365 (1971) (conditioning entitlement to welfare benefits on citizenship or residency); *Sherbert* v. *Verner,* 374 U.S. 398 (1963) (conditioning unemployment compensation on agreement infringing on religious beliefs); *Speiser* v. *Randall,* 357 U.S. 513 (1958) (conditioning tax exemption on inhibition of freedom of speech). "This argument is often phrased in syllogistic terms: if the legislature may withhold a particular benefit, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions." 73 HARV. L. REV. at 1595. *E.g., Terral* v. *Burke Construction Co.,* 257 U.S. 529 (1922) (state may not condition right to do business upon acceptance of unconstitutional conditions).

together with interest and, in an appropriate case, attorney's fees. 49 U.S.C. § 8. The Commission order here at issue, however, required the carriers to waive their rights to have their liabilities determined under those criteria, and to undertake instead to "refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission . . ." 636a.

While it is possible that any rate which may subsequently be prescribed for the future will bear a close relationship to the maximum rate that would have been lawful in prior periods, it is well established that the two need not be the same. "[A]warding reparation for the past and fixing rates for the future involve the determination of matters essentially different. . . . One is made by the Commission in its *quasi*-judicial capacity to measure past injuries sustained by a private shipper; the other, in its *quasi*-legislative capacity, to prevent future injury to the public." *Baer Bros.* v. *Denver & Rio Grande Railroad,* 233 U.S. 479, 486 (1914). *See Cattle Raisers' Association* v. *Chicago, Burlington & Quincy Railroad,* 10 I.C.C. 83, 89-90 (1904). To say that one rate shall apply for the future is not to say that no higher rate could have been lawful for the past.[65]

If the Commission did ultimately condemn the carriers' rates in this case and undertook to prescribe the rates for the pipeline, no doubt such rates would be based on the volume of oil expected to be transported in the future. The

65. "Where the question of what is the reasonable rate for the future, or what would have been the reasonable rate for the past, is a close one on the record, and since in either case the exact figure of reasonableness is not demonstrable and must rest upon judgment and conscience enlightened by all the facts, circumstances and conditions, we may in many cases be reasonably well satisfied as to what we should do for the future, while hesitating to apply to past transactions as a basis for reparations the rate fixed for the future, on account of the closeness of the question and the impossibility of demonstration as to what is exactly right . . ." *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R.,* 51 I.C.C. 635, 640-41 (1918).

carriers would be entitled to argue that the same rate was not necessarily the maximum lawful rate at the time the pipeline was commencing operations, since special circumstances then prevailing made transport costly and uneconomical. And the carriers should be allowed a due process decision of that claim, in accordance with the procedures prescribed by statute.

Conclusion

In authorizing construction of the Trans Alaska Pipeline System, Congress intended that those who undertook that task should be allowed to operate the pipeline in accordance with the regulatory plan of the Interstate Commerce Act, at rates fixed either by the carriers themselves or by government agency, after full hearing, under the procedures of the Act. If private investment is to retain a role in our mixed economy in the accomplishment of such projects, it is important that this Court reaffirm the procedures which Congress intended to safeguard such investment. Petitioners contend that the lawfulness of their original rates should be judged, and any authority to prescribe different rates should be exercised, upon a fair hearing, with due process of law, upon a record which allows judicial review.

Accordingly, for the reasons set forth above, the decision of the United States Court of Appeals for the Fifth Circuit should be Reversed.

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STATUTORY APPENDIX

STATUTORY APPENDIX

Interstate Commerce Act

§ 1. Regulation in general; car service; alteration of line

Carriers subject to regulation

(1) The provisions of this chapter shall apply to common carriers engaged in—

* * *

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—49 U.S.C. § 1(1)(b) (1976) (originally enacted as the Act to Regulate Commerce of 1887, ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.

* * *

Definitions

(3) (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; . . . 49 U.S.C. § 1(3)(a)(1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, ch. 3591, §1, 34 Stat. 584; Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 2 (a), (b), 54 Stat. 899).

* * *

Just and reasonable charges; applicability; criteria for determination

(5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this part. 49 U.S.C. § 1(5)(a)(1976) (originally enacted as the Act to Regulate Commerce of 1887, ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 2(d), 54 Stat. 899; Act of Aug. 2, 1949, ch. 379, § 1, 63 Stat. 485; Act of Feb. 5, 1976, Pub. L. 94-210, Title II, § 202(a), (b), 90 Stat. 34, 35).

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§ 6. Schedules and statements of rates, etc., joint rail and water transportation

Schedule of rates, fares, and charges; filing and posting

(1) Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter. 49

U.S.C. § 6(1) (1976) (originally enacted as the Act to Regulate Commerce of 1887, ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, ch. 91, § 409, 41 Stat. 483; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543).

• • •

Change in rates, fares, etc.; notice required; simplification of schedules

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, . . . 49 U.S.C. § 6(3) (1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, ch. 91, §§ 409, 410, 41 Stat. 483).

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Transportation without filing and publishing rates forbidden; rebates; privileges

(7) No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless

the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; . . . 49 U.S.C. § 6(7) (1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 6, 24 Stat. 380, *as amended by* Act of Mar. 2, 1889, ch. 382, § 1, 25 Stat. 855; Act of June 29, 1906, ch. 3591, § 2, 34 Stat. 586; Act of Feb. 28, 1920, ch. 91, § 411, 41 Stat. 483; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543).

• • •

§ 13. Complaints to and investigations by Commission Complaint to Commission of violation of law by carrier; reparation; investigation

(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition. . . . If . . . such carrier or carriers shall not satisfy the complaint . . . , or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of. . . . 49 U.S.C. § 13(1) (1976) (*originally enacted as* Act to Regulate Commerce, ch. 104, pt. I., § 13, 24 Stat. 383; *as amended* by the Mann-Elkins Act of 1910, ch. 309, § 11, 36 Stat. 550; the Transportation Act of 1920, ch. 91, § 416, 41 Stat. 484; Act of August 9, 1935, ch. 498, § 1, 49 Stat. 543.

(4) Whenever, in any such investigation the Commission, after full hearing, finds any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference, or prejudice . . . , or unjust

discrimination . . . , which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, ... 49 U.S.C. § 13(4) (*originally enacted as* Act to Regulate Commerce, Feb. 4, 1887, ch. 104, pt. I., § 13, 24 Stat. 383; *as amended by* the Transportation Act of 1920, Feb. 28, 1920, ch. 91, § 416, 41 Stat. 484; Act of August 12, 1958; Pub. L. No. 85-625; § 4, 72 Stat. 570; Act of February 5, 1976, Pub. L. No. 94-210, Title II, § 210, 90 Stat. 46.)

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§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. 49 U.S.C. § 8 (1976) (originally enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 8, 24 Stat. 332; *as amended by* Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543).

• • •

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

Commission empowered to determine and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any

pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed. 49 U.S.C. § 15(1) (1976) (originlly enacted as Interstate Commerce Act of 1887, ch. 104, pt. I, § 15, 24 Stat. 384, *as amended by* Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 589; Act of June 18, 1910, ch. 309, § 12, 36 Stat. 551; Act of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484; Act of June 19, 1934, ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 10(a), 54 Stat. 911).

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Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid,

and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter. 49 U.S.C. § 15(7) (1976) (originally enacted as Mann-Elkins Act of 1910, ch. 309, § 12, 36 Stat. 551, *amending* Act of Feb. 4, 1887, ch. 104, pt. I, § 15, 24 Stat. 384, *and as amended by* Act of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484; Act of Mar. 4, 1927, ch. 510, § 2, 44 Stat. 1447; Act of Sept. 18, 1940, ch. 722, Title I, § 10(c), 54 Stat. 912; Act of Feb. 5, 1976, Pub. L. No. 94-210, Title II, § 202(e)(1), 90 Stat. 36).

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§ 15a. Fair return for carriers

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; . . . and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. This paragraph shall not apply to common carriers by railroad subject to this chapter. 49 U.S.C. § 15a(2) (*Originally enacted as* the Transportation Act of 1920, ch. 91, § 422, 41 Stat. 488,

amending the Act to Regulate Commerce, Feb. 4, 1887, ch. 104, pt. I.; *as amended by* Act of June 16, 1933, ch. 91, Title II, § 205, 48 Stat. 220; Act of Aug. 9, 1935, ch. 498 § 1, 49 Stat. 543; Act of Sept. 18, 1940, ch. 722, Title I, § 10 (e), 54 Stat. 912, Act of Aug. 12, 1958, Pub. L. No. 85-625, § 6, 72 Stat. 572; Act of July 10, 1973, Pub. L. No. 93-69, Title II, § 201, 87 Stat. 166; Act of Feb. 5, 1976, Pub. L. No. 94-210, Title II, §§ 203(b), 205, 90 Stat. 39, 41.)

Trans-Alaska Pipeline Authorization Act

§ 1. Congressional findings and declaration

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

(b) The Department of the Interior and other Federal agencies, have, over a long period of time, conducted extensive studies of the technical aspects and of the environmental, social, and economic impacts of the proposed trans-Alaska oil pipeline, including consideration of a trans-Canada pipeline.

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

(d) A supplemental pipeline to connect the North Slope with a trans-Canada pipeline may be needed later and it should be studied now, but it should not be regarded as an alternative for a trans-Alaska pipeline that does not traverse a foreign country. 43 U.S.C. § 1651 (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Title II, § 202, 87 Stat. 584).

§ 2. Authorizations for construction—Congressional declaration of purpose

(a) The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto. 43 U.S.C. § 1652(a) (1976) (Act of Nov. 16, 1973, Pub. L. 93-153, Title II, § 203, 87 Stat. 584).